82-965

NO. _____

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

L. Q. LINAHAN, WARDEN,

Petitioner,

vs.

REBECCA A. MACHETTI
a/k/a REBECCA A. SMITH,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT

OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

When a state habeas court has chosen to hear fully and decide a claim of unconstitutional jury composition on its merits without objection by the warden, and a federal magistrate has found, without objection by the warden, that the state habeas court indeed determined the merits of such claim, do the decisions of this Court in Engle v. Isaac, ___ U.S. ___, 71 L.Ed. 2d 783 (1982) and United States v. Frady, ___ U.S. ___, 71 L.Ed. 2d 816 (1982) apply?

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RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Warden's Petition is premised on three contentions: (1) that the state habeas court never reached the merits of Rebecca Machetti's claim of unconstitutional jury composition; (2) that Ms. Machetti's claim was therefore waived because it was not made at her original trial; and (3) that the district court never considered the claim in the light of Wainwright v. Sykes, 433 U.S. 72 (1977). As the following facts clearly show, these premises are false.

Respondent Machetti filed a petition for writ of habeas corpus in the Superior Court of Baldwin County, Georgia on January 9, 1978. In her petition she contended, inter alia, that she was indicted and tried by a jury which unconstitutionally excluded women. In Paragraph K she pleaded:

> K. The imposition and execution of Petitioner's death sentences violate the Sixth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec. I, ¶¶I, XI and XI of the Constitution of the State of Georgia by denying her trial by a representative [jury].
>
> *****
>
> (5) Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in a similar status do not have a comparable right.

(A copy of the petition is contained in the Appendix.)

The return and answer of the Warden at Paragraph 30 denied Ms. Machetti's allegation but did not raise any defense of waiver:

> Respondent denies that portion of the petition entitled paragraph K. in which Petitioner alleges that the imposition and execution of Petitioner's death sentences violate the Sixth and Fourteenth Amendments by denying her a trial by a representative [jury].

(A copy of the return and answer is contained in the Appendix.)

On February 16, 1978, Ms. Machetti amended her petition for writ of habeas corpus by alleging unconstitutional exclusion of both women and blacks from the grand and traverse juries:

> (6) Petitioner was indicted, convicted and sentenced to die by juries in which women and blacks were greatly underrepresented.

She also added four new paragraphs to her claim of ineffective assistance of counsel, including the allegation that her trial counsel had failed to object to the sex or race composition of the jury pools. (A copy of the amendment is contained in the Appendix.)

The supplemental return and response of the Warden again denied the allegations and did not mention waiver:

> Respondent admits that portion of the amendment to the petition entitled A.(25) in which the Petitioner states that her trial counsel failed to object to the sex or race composition of the grand or traverse jury pool, but denies that this resulted in the Petitioner receiving the ineffective assistance of counsel at trial.
>
> ******
>
> Respondent denies that portion of the amendment to the petition as subparagraph (6) to paragraph 9(k) in which the Petitioner states that she was indicted, convicted and sentenced to die by juries in which women and blacks were greatly underrepresented.

(A copy of the supplemental return and response is also contained in the Appendix.)

At the state habeas hearing on March 2-3, 1978, Ms. Machetti called as witnesses both the Clerk of the Superior Court of Bibb County, Georgia, and the Chairman of the Jury Commission. The warden made no objection to either witness on the basis of waiver, relevancy, or any other ground. Both were examined and cross-exmained in detail on the composition of the jury pool and methods of jury selection. In response to the Warden's objection to questions about the composition of previous jury pools in Bibb County, the court asked Ms. Machetti's counsel what she was trying to prove:

> [ASSISTANT ATTORNEY GENERAL SUSAN] BOLEYN: Your Honor, what is the relevance of the testimony as to the box before 1973?
>
> THE COURT: Ms. Oakley?
>
> MS. OAKLEY: We are trying to show exclusion, and I think we need to go back more than to the box we are talking about.

THE COURT: If that is what she is trying to prove. Is that alleged as one of the grounds in the petition?

MS. OAKLEY: It is alleged both as a separate ground and it is alleged as failure of counsel to challenge.

THE COURT: All right, you may proceed. I overrule the objection. [1]

Hearing T. 80-81 (Pages 80-81 of the state habeas hearing transcript are contained in the Appendix.) The Warden did not object further or seek a ruling limiting testimony to the issue of ineffective assistance of counsel.

The Order of May 9, 1979, denying the state habeas petition, is contained in its entirety in the Appendix. From page 8 to page 54 the superior court addressed the claim of ineffective assistance of counsel. Then, in a separate section, after discussing several other constitutional claims, the court turned to Ms. Machetti's allegation of unconstitutional jury composition on its merits:

> It appears to this Court from the testimony and evidence presented that [Ms. Machetti] has now shown that an opportunity for discrimination existed from the source of the jury list, and secondly, though they show some disparity between the per centages of blacks and women in the population, [Ms. Machetti] has not shown the significant disparity necessary for finding that a jury was non-representative. As to the ineffective assistance of counsel claim, it appears to this Court that since there was no illegality in the composition of the juries, Counsel was not ineffective in failing to challenge the juries as being non-representative. Therefore, this Court concludes from the testimony and evidence presented, that the contentions of [Ms. Machetti] are without merit.

Smith v. Hurley, No. 13548 (Super. Ct. Baldwin Co., Ga., Order of May 9, 1979, p. 91)(emphasis added).

When Ms. Machetti applied to the Supreme Court of Georgia for a certificate of probable cause to appeal, the Warden did not cross appeal.

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[1] It is obvious from this exchange that the Warden's objection related to the relevancy of evidence of earlier jury boxes rather than to any testimony on the merits of the claim.

In her federal habeas corpus petition filed August 29, 1979, Ms. Machetti alleged:

> 90. Petitioner was indicted, convicted, and sentenced to die by juries which excluded representative numbers of women and blacks, in violation of rights guaranteed to her by the Sixth and Fourteenth Amendments to the Constitution of the United States.
>
> Facts supporting Petitioner's claim that her constitutional rights were violated by a nonrepresentative jury.
>
> 91. Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in similar status do not have a comparable right, thus reducing the available number of women in the jury pools.
>
> 92. The grand and traverse jury pools from which came the grand and traverse juries which indicted, convicted and sentenced Petitioner were greatly under-representative of women and blacks.

The case was submitted to the magistrate for proposed findings of fact and conclusions of law. In his report and recommendations filed March 24, 1981, the magistrate dealt with the jury claim by first addressing the waiver issue:

> Petitioner's trial counsel failed to challenge the composition of the juries by motion and to produce evidence in support of the alleged discrimination prior to trial. No enumeration of error or evidence concerning unconstitutional jury selection procedures was thereafter presented on direct appeal to the Supreme Court of Georgia. It was not until the state habeas corpus proceeding that petitioner's appellate counsel raised the jury composition issue.
>
> At the time of petitioner's trial in February and March, 1975, the Georgia courts had established a decisional rule that a defendant's failure to object to the grand or traverse jury before or during trial waived that objection as a basis for habeas relief. Stewart v. Ricketts, 451 F.Supp. 911 (M.D. Ga. 1978). Normally federal courts should honor such a procedural rule by not allowing the convicted defendant to raise the jury claims in a federal habeas corpus proceeding. Francis v. Henderson, 425 U.S. 536 (1976). Where, however, the state habeas corpus court chose to litigate the merits of the grand and traverse jury issues despite the state imposed waiver, then a federal court must likewise examine the merits of the unlawful composition claim. Lefkowitz v. Newsome, 420 U.S. 283, 292 (1975); Newman v. Henderson, 539 F.2d 502 (5th Cir. 1976). In the instant case, the state habeas corpus court had before it petitioner's allegations of an unconstitutional grand and traverse jury and adjudicated the merits

> of the allegations against petitioner. Thus, this Court must address the same issues. Newman v. Henderson, supra.

Machetti v. Linahan, No. 79-210-MAC (M.D. Ga. March 24, 1981). (A copy of the proposed findings of fact and conclusions of law is found in the Appendix.) Then, proceeding to the merits of the case, the magistrate found that Ms. Machetti had shown under-representation of women in her jury pool because of Georgia Code §59-124, but refused to apply Duren v. Missouri, 439 U.S. 357 (1979) retroactively to the almost identical Georgia statute even though Ms. Machetti's trial commenced more than a month after this Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975).

Although required by Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courys and 28 U.S.C. §626(b) to object to the findings and conclusions of the magistrate in order to preserve any objection to the magistrate's finding that the state court had reached the merits, the Warden did not object to anything.

The United States District Court for the Middle District of Georgia "approve[d] and adopt[ed] the Magistrate's proposed findings of fact and conclusions of law in their entirety" with the exception of "the Magistrate's suggestions as to whether [Ms. Machetti] established a prima facie case of unconstitutional jury box composition." Machetti v. Linahan, 517 F.Supp. 1976 (M.D. Ga. 1981). The district court ruled against Ms. Machetti on the merits of her claim, refusing to apply Duren v. Missouri, supra, retroactively.

Although Ms. Machetti appealed the district court's denial of relief, Warden Linahan did not cross-appeal from the district court's adoption of the magistrate's findings or otherwise.

The Court of Appeals for the Eleventh Circuit, after expressly noting that the district court had considered the waiver question,[2/] reversed the lower court's judgment with regard to jury composition. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982). Rehearing was denied August 24, 1982.

[2/] Machetti v. Linahan, 679 F.2d 236, 238 n.4 (11th Cir. 1982).

REASONS FOR DENYING THE WRIT

BECAUSE THE STATE HABEAS COURT FULLY CONSIDERED AND ADJUDICATED RESPONDENT'S JURY COMPOSITION CLAIM ON ITS MERITS, THE DECISION OF THE COURT OF APPEALS WAS CORRECT AS A MATTER OF LAW.

More than four and one-half years after the state habeas evidentiary hearing, three and one-half years after the state habeas court's adjudication of Ms. Machetti's jury composition challenge on the merits, a year and one-half after the U.S. Magistrate concluded there was no waiver problem as a matter of law and the U.S. District Court adopted that conclusion, and after the Eleventh Circuit ruled in favor of Ms. Machetti, ordering that her conviction and death sentences should be vacated, Petitioner Linahan now suggests to this Court that the state habeas court did not really determine the issue on the merits. Petitioner's contention is patently untrue.

Although the state habeas court had the power to hold the jury composition issue had been waived and to refuse to entertain Ms. Machetti's claims on the merits, it did not do so. To the contrary, the state court heard full testimony of two witnesses and held that there was no merit to either Ms. Machetti's contention of unconstitutional jury composition or her contention that trial counsel provided ineffective assistance, by, inter alia, failing to object to the grand and traverse juries.[3/]

Petitioner did not object to Ms. Machetti's jury composition claim in either his answer or his answer to the amendments to her petition. He did not object to any testimony on the merits of the contention at the state hearing. He did not appeal the ruling on the merits by the state habeas court.

Nor did Petitioner make the necessary and requisite objections to the proposed findings of fact and conclusions of law

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[3/] See pages 2 - 3, supra.

below.[4/] When the district court adopted the magistrate's proposed findings and conclusions including the waiver issue, Machetti v. Linahan, 517 F.Supp. 1976 (M.D. Ga. 1981), Petitioner did not cross-appeal to the Eleventh Circuit.

The Eleventh Circuit correctly applied the law in this case:

> Generally, a federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during the trial constitutes waiver of that objection as a basis for habeas corpus relief. Francis v. Henderson, 425 U.S. 536, 541-43, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976); Stewart v. Ricketts, 451 F.Supp. 911, 913-14 (M.D. Ga. 1978). A Georgia decisional rule in force at the time of appellant's trial in February and March, 1975, mandated that result. Where, however, the state habeas court entertains the federal constitutional claims on the merits, as in the instant case, the federal habeas court must also adjudicate the merits. Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975); Newman v. Henderson, 539 F.2d 502, 505 (5th Cir. 1976)

Machetti v. Linahan, 679 F.2d 236, 238 n.4 (11th Cir. 1982).

It is therefore clear that the crucial difference between this case and Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783 (1982) and United States v. Frady, ___ U.S. ___, 71 L.Ed. 2d 816 (1982), is that there is no procedural default in this case because the state habeas court fully considered and adjudicated Ms. Machetti's jury composition claims on the merits. There was no need for any federal court to make a threshold inquiry into cause or prejudice; the state habeas court had already made the ultimate inquiry into the merits of the claim.

The deference to state court determinations and the principle of comity on which the recent decisions of this Court regarding waiver and 28 U.S.C. §2243 cases rest present no problem in the instant case: the Court of Appeals for the Eleventh Circuit was merely correcting an error of law made by both the state and federal habeas courts in the application of Duren v. Missouri, supra, to the facts of this case as developed in the

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[4/] See page 5, supra.

state habeas proceedings. Any other interpretation would limit the power of this Court to interpret the Constitution of the United States.

CONCLUSION

Because the United States Court of Appeals for the Eleventh Circuit correctly applied the law in this case in which Respondent's claim of unconstitutional jury composition had been fully adjudicated in the state habeas court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, MARY ANN B. OAKLEY, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Response in Opposition to Petition for Writ of Certiorari upon the Petitioner by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed to counsel for Petitioner as follows:

Ms. Susan V. Boleyn, Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 8th day of December, 1982.

Mary Ann B. Oakley
MARY ANN B. OAKLEY

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L. Q. LINAHAN, Warden,

Petitioner,

v.

REBECCA A. MACHETTI,
a/k/a REBECCA A. SMITH,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Rebecca A. Machetti, a/k/a Rebecca A. Smith, by her undersigned counsel, asks leave to file the attached Response to Petition for Writ of Certiorari and to proceed in forma pauperis pursuant to Rule 46. An affidavit by Respondent in support of this motion is attached hereto. Respondent has proceeded in forma pauperis throughout these proceedings in the District Court and Court of Appeals.

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v.

REBECCA A. MACHETTI,
a/k/a REBECCA A. SMITH,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO RESPOND TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

I, REBECCA A. MACHETTI, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are your presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. NO

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1974 - 400-500 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. [illegible] building [illegible]

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned. NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Rebecca Machetti
REBECCA A. MACHETTI, Respondent

Sworn to and subscribed
before me this 17th day
of November, 1982.

Judy P Frey
Notary Public

My commission expires: 1-15-86

CERTIFICATE OF SERVICE

I, MARY ANN B. OAKLEY, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Motion for Leave to Proceed In Forma Pauperis and Affidavit in Support of Motion to Respond to Petition for Writ of Certiorari In Forma Pauperis upon Petitioner by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed to counsel for Petitioner as follows:

Ms. Susan V. Boleyn
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 8th day of December, 1982.

Mary Ann B Oakley
MARY ANN B. OAKLEY